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No. 93-1722

In The

Supreme Court of the United States

October Term, 1993

JACQUELINE R. MORGAN,

Petitioner,

v.

JOHN S. FORD, et al.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether private complaints by a public employee of alleged job discrimination against him or her that are made for the purpose of improving that employee's working conditions are on a matter of "public concern" to the community and thus protected by the First Amendment.

2. Whether, assuming *arguendo* that petitioner's First Amendment speech rights were violated, respondents are entitled to qualified immunity because reasonable prison officials in their positions could have believed in 1985-1988 that private complaints by a public employee of alleged job discrimination against him or her that were made for the purpose of improving that employee's working conditions were not on a matter of "public concern" to the community and thus not protected by the First Amendment.

LIST OF PARTIES

In addition to those listed by petitioner, the Georgia Department of Corrections was named as a party defendant.

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STATEMENT OF THE CASE

A full statement of facts is necessary because petitioner Morgan repeatedly misstates the record and relies on inadmissible hearsay. She was employed as a correctional officer at Augusta Correctional and Medical Institution ("ACMI") from September 1984 until April 1988. She was hired at the rank of Correctional Officer 1 and resigned as a Correctional Officer 2. (R1-Morgan Dep.-5, 13-15). ACMI is operated by defendant Georgia Department of Corrections ("DOC").

At the time of the events in question, Ford was a Lieutenant at ACMI. (R2-Ford Dep.-7). Burden was Superintendent of ACMI (R1-48-Exhibit A (Burden Declaration) at ¶2) and Meadows was Deputy Superintendent. (R1-48-Exhibit B (Meadows Declaration) at ¶2; R3-66).

Ford supervised petitioner during a portion of her employment at ACMI. Ford first supervised her for 6 months in 1985. (R1-Morgan Dep.-13-14; R1-48-Exhibit C (Ford Declaration) at ¶4). According to Morgan, Ford next supervised her in 1987. (R1-Morgan Dep.-105-107). This second period of supervision was not for a full 6 months. Ford says that he supervised her from September 9, 1987 through November 3, 1987. (R1-48-Exhibit C at ¶4). This evidence is unrebutted.

Morgan's social and marital status is pertinent. While employed at ACMI, Morgan was single and without children. (R1-Morgan Dep.-19). She actively dated (R1-Morgan Dep.-19-20). Moreover, as Correctional Officer Kenneth Carswell stated: "She's an attractive lady." (R2-Carswell Dep.-13). Ford was also single. (R1-48-Exhibit C at ¶16).

Although petitioner alleges that Ford sexually harassed her, she candidly admits that usual forms of such harassment were not used. She admits that Ford

never asked her for a date in the sense of accompanying him on a social occasion, physically touched her, exposed himself to her, or requested sexual favors. According to Morgan, he never used the word "date" or "sex" in speaking to her. (R1-Morgan Dep.-25-27, 52, 164).

Instead, Morgan complains that the following actions by Ford constitute sexual harassment. She states that the first series of actions all occurred during the six months of her supervision by Ford in 1985. (R1-Morgan Dep.-97-98). According to her, Officer Kenneth Carswell told her that Ford "wanted to go out on a date" with her. (R1-Morgan Dep.-18). Carswell testified on deposition that he, in response to a request by Ford, asked Morgan, "[D]o you want to go out with him?" (R2-Carswell Dep.-8). According to Carswell, Morgan profanely rejected the idea. (R2-Carswell Dep.-8, 48). This is the only request for a date shown by the record.

Petitioner also complains that on one occasion Ford told her "that Mr. Burden told him that he could not get his check and his pussy in the same place, 'But what he does not know will not hurt him.' " According to Morgan, this statement occurred during the first 6 months of her supervision by Ford. (R1-Morgan Dep.-47). Petitioner admits that she was certainly not offended by the idea that an employee should not date or have sexual relations with other employees, but that she considered the use of the word "pussy" to be offensive. (R1-Morgan Dep.-50-51). Morgan also interpreted Ford's statement to mean that he was going to try to do it anyway, despite Burden's directions. (R1-Morgan Dep.-51-52). But she admits that Ford never asked her for a date or sexual favors. (R1-Morgan Dep.-52).

Petitioner also complains that during the first 6 months of supervision Ford spent excessive amounts of time on her unit. (R1-Morgan Dep.-97-98). She testified

that on one occasion he stayed 4 to 5 hours in the AIDS Unit, 4-A. (R1-Morgan Dep.-55-56). But, according to petitioner, "nothing" happened when Ford stayed what she considered excessive amounts of time on her unit. (R1-Morgan Dep.-57-58). Yet she complains that during the 4 to 5 hour visit, Ford engaged in "constant checking" of her work. (R1-Morgan Dep.-64). She recalls the following conversation with Ford:

> Q. During the four to five hours, did he say anything at that time.
>
> A. That was when he was telling me about someone broke into – someone threw a brick through his bedroom window, and he asked me was it me. And I asked him did it hit him. And he said no, so I said it wasn't me.

(R1-Morgan Dep.-59). According to Morgan, Ford also said on this occasion: " 'You haven't had a real man until you've had me.' " (R1-Morgan Dep.-101). She says that during Ford's supervision of her he stayed on her unit longer than "normal" approximately once during each 4 or 5 day period. (R1-Morgan Dep.-67). Morgan also testified that Ford remained "about an hour or an hour and a half" on another occasion when "he stayed in the hallway when I was working with the AIDS patients during visitation." (R1-Morgan Dep.-68). On this occasion, Ford was approximately 8 feet away from her. (R1-Morgan Dep.-68-69). In her deposition, petitioner testified that on this occasion, Ford told her "that nobody was going to believe me with the sexual harassment thing and I just needed to stop it and I needed to stop it right then." (R1-Morgan Dep.-69-70).

Petitioner also complains of an incident that occurred at or near the ACMI gymnasium during the first 6 months of supervision by Ford. (R1-Morgan Dep.-97-98). After gym activities were concluded one night, Ford

apparently attempted to make an unannounced visit to Unit 12-A. Morgan called and warned the guard in Unit 12-A that Ford was coming. The next day, Morgan was reassigned. (R1-Morgan Dep.-81-83). At her deposition, she agreed that this incident was not sexual harassment. Nevertheless, she terms it general harassment. (R1-Morgan Dep.-83-85).

Morgan also complains that during the first 6 months of Ford's supervision and while working Unit 13-A, she engaged in a radio conversation with an Officer Chapman or Walker in another unit. (R1-Morgan Dep.-97-98). In this conversation, petitioner says that she told her fellow officer she was going to quit because of Ford's harassment. Although Morgan states that Ford never said anything to her about this conversation, the next day she was transferred to P-1 and her fellow officer was transferred to P-2. (R1-Morgan Dep.-86-91). Morgan also testified that at briefing the next day, Ford said:

> "There have been some rumors going around that I had been monitoring people's conversations. I have not been monitoring people's conversations. I have just been listening in to see how people talk to the inmates."

(R1-Morgan Dep.-88).

Petitioner also complains that once while she was off-duty Ford made a comment about her appearance. This also occurred during the first 6 months of her supervision by Ford. (R1-Morgan Dep.-93, 97-98). Morgan testified that she and her ex-boyfriend's sister came by ACMI on the way to a party. According to Morgan, "Lieutenant Ford made the comment to me that he didn't know that I can look that well in a dress, and that he's envisioned me without the dress on." (R1-Morgan Dep.-92-93).

All of the complaints mentioned so far allegedly occurred in 1985 in the first 6 months of Ford's supervision of Morgan. (R1-Morgan Dep.-97-98). During the next

6 months of her employment at ACMI, petitioner was not supervised by Ford, who transferred to a different shift. (R1-Morgan Dep.-98-100). During this period, she had "a lot less contact with Lieutenant Ford." (R1-Morgan Dep.-100). However, she complains that during this period at least once he again commented to her: " 'You haven't had a real man until you've had me.' " (R1-Morgan Dep.-100-104).

According to petitioner, Ford next supervised her in 1987. (R1-Morgan Dep.-105-106). This supervision began during Morgan's military leave which lasted from April 1987 through September 1987. (R1-Morgan Dep.-106). Ford says that he supervised Morgan from September 9, 1987 through November 3, 1987. (R1-48-Exhibit C at ¶4). Thus, from at least December 31, 1985 until September 1987, Ford did not supervise Morgan.

During the some 20 months when Ford was not supervising petitioner, they had little contact. She testified:

> He didn't make too many comments to me during that time, like I said earlier, because I had very little contact with him when he did not supervise me.

(R1-Morgan Dep.-104; *id.* at 172).

After her return from military leave in September 1987, Morgan for the first time complained to Superintendent Burden about her problems in 1985 with Ford. (R1-Morgan Dep.-108). She aired her complaints with Burden when she was called as a witness for Sheila Parrish. (R2-Burden Dep.-39). Petitioner testified in her deposition that she informed Burden of her complaints from 1985 against Ford which have been mentioned so far in this brief. (R1-Morgan Dep.-112-114). Morgan says that while on military leave she decided to pursue her complaints against Ford. (R1-Morgan Dep.-114-116).

Based on Burden's suggestion, petitioner repeated her complaints to the Internal Affairs Division of DOC. (R1-Morgan Dep.-119). The Internal Affairs Division found nothing to "substantiate the claims of sexual harassment against Lieutenant Ford." (R2-Burden Dep.-44). On October 9, 1987, Burden wrote letters to Morgan and Ford. In his letter to Morgan, Burden said:

> Recently you came to my office for the purpose of providing supporting testimony to Officer Sheila Parrish's claim of sexual harassment by Lt. John Ford.
>
> During the interview with me (Superintendent Burden) and with Internal Affairs Investigator Horne you failed to establish any incident which would be considered sexual harassment either directed at you or Officer Parrish.
>
> This letter to you is a warning. You have made a serious charge against your supervisor but were unable to substantiate those charges. Your having done so is unprofessional, unethical, and deemed harassing in itself.
>
> While I will not tolerate sexual harassment in the workplace. I am equally protective of those wrongfully accused. You are hereby warned against such future misconduct. Should misconduct of this nature reoccur disciplinary measures will be taken.

In his letter to Ford, Burden said:

> As a result of investigations by Superintendent Burden and by Jim Horne of GDC Internal Affairs you are cleared of the charges of sexual harassment filed against you by Officers Sheila Parrish and Jacqueline Morgan.
>
> It was noted in the investigation that your admitted personal conversation and remarks made during these personal conversations were

> used against you as sexual harassment. It was also noted that at no time did you ask for or demand sexual favors from either officer, by their own admission.
>
> You are admonished, however, for placing yourself in a position which could be construed as personal during the course of your tour of duty but are exonerated from sexual harassment charges.

(R1-48-Exhibit A at ¶¶4-5; Attachments 1 and 2 to Exhibit A).

According to petitioner, "some sexual harassment" continued but her primary problem became general harassment or retaliation. (R1-Morgan Dep.-124-125). After receiving Burden's letter, Morgan told Ford, "I was not going to fuck him and he was not going to fuck me for not doing so." (R1-Morgan Dep.-126). At one point in her deposition, Morgan stated that she made this remark to Ford because of the Burden letter. (R1-Morgan Dep.-127). Petitioner testified, "Lieutenant Ford didn't say nothing. He didn't write me up. He didn't do nothing." (R1-Morgan Dep.-126).

Morgan also complains that Ford on several occasions, both during and after the first six months of supervision, made statements regarding love and hate. Morgan describes Ford's statements as follows:

> "There is a thin line between love and hate, Morgan." That's all he would say, "There's a thin line between love and hate," and one day I was going to realize that I love him. And that, "You ain't got to love me. My mamma loves me," and stuff like that. He constantly made that statement of there's a thin line between love and hate. I failed to mention that the first six months, too.

(R1-Morgan Dep.-127-128). Although Morgan cannot remember the exact number of times Ford made this

statement, she says that it was made more than 3 times. (R1-Morgan Dep.-128).

Petitioner next complains that she was admonished or received a "counseling statement" for failing to respond to an "officer needs assistance" call in Dorm 11-A. (R1-Morgan Dep.-131). Morgan admits that she did not receive a written charge or disciplinary statement for this incident. (R1-Morgan Dep.-131). Apparently, Correctional Officer John Diggins reported her for failing to respond to an "officer needs assistance" call. (R1-Morgan Dep.-132-136, 180). According to petitioner, Ford stated regarding her conduct:

> He said that it would not be tolerated and that he was warning me. It was a counseling statement and he was warning me.

(R1-Morgan Dep.-136). Morgan agreed that this counseling statement "had no effect on [her] salary or [her] rank or the conditions of [her] employment." (R1-Morgan Dep.-137).

Petitioner next complains that she was admonished or counseled for being rude to a visitor. She received this counseling statement from defendant Meadows. According to Morgan,

> [Meadows] said that Lieutenant Moore noticed me when I came into work when we walked through the sally port to get back into the briefing room. He said that Lieutenant Moore said that I had been rude to a visitor. And Lieutenant Moore talked to Lieutenant Ford about it, and Lieutenant Ford suggested I be counseled on it, so I got called up about a week or so later by Mr. Meadows, and I was counseled on being rude to a visitor.

(R1-Morgan Dep.-138-39). Petitioner says that this incident occurred in October or November of 1987. (R1-Morgan Dep.-139). Although Morgan claims that this

counseling statement affected her emotionally, she admits that it did not affect the conditions of her employment. (R1-Morgan Dep.-140-141). According to Morgan, Meadows was retaliating because by this time she had filed a complaint with the Georgia Office of Fair Employment Practices (OFEP). (R1-Morgan Dep.-141-142). The only reason she has for believing Meadows was retaliating for her complaint is "[h]e's Lieutenant Ford's supervisor." (R1-Morgan Dep.-142).

Morgan complains that, on November 3, 1987, she was given an interim report of performance with a 2.6 rating. (R1-Morgan Dep.-138, 142, 147; Appellant's Eleventh Cir. Brief at 6; R1-48-Exhibit C at ¶8; Attachment 1 to Exhibit C). According to petitioner, Ford presented her with this rating and stated that she "had a negative attitude toward [her] supervisor and that [she] talked on the phone too much." (R1-Morgan Dep.-142-43). Morgan states that in July 1987, while on military leave, she had received a 3.4 rating.

Petitioner also objects to various assignments at ACMI after her complaints of sexual harassment. She states that she was the first female ever to work the tower. Although she would have considered assignment to that position by another supervisor as a recognition of her ability, because it came from Ford she considered it "another form of harassment." (R1-Morgan Dep.-148). Morgan states that she had no problems on the tower. According to her, "I was good." (R1-Morgan Dep.-149). Petitioner is, however, mistaken in her statement that she was the first female to work the tower. Her statement may not be considered because she does not purport to speak on personal knowledge. Fed. R. Evid. 602; Fed. R. Civ. P. 56(e). The contrasting declaration of Ford, made on personal knowledge, establishes that other females had been assigned before Morgan to the tower and other

locations (Units 11-A, 12-A, and 122-B) about which Morgan now complains. (R1-48-Exhibit C at ¶7).

She also complains of assignments to Units 11-A, 12-A, and 12-B. (R1-Morgan Dep.-149-152). As with respect to the tower assignment, petitioner did not consider the positions themselves to be harassing but interprets her assignment by Ford to those positions as harassing. (R1-Morgan Dep.-151-153).

Morgan applies a strict definition of "sexual harassment." According to her, two other fellow staff members at ACMI, Lieutenant Moore and Sergeant James Smith also asked her for dates. Morgan testified on deposition that she also considered these requests to be sexual harassment. (R1-Morgan Dep.-164-165).

According to petitioner, the only act of strict sexual harassment by Ford after she filed her OFEP charge in November 1987 was the comment about a "thin line between love and hate." (R1-Morgan Dep.-171-172).

As previously stated, Morgan resigned from ACMI in April 1988. (R1-48-Exhibit C at ¶10; Attachment 3 to Exhibit C). In this suit, Morgan contends that she was constructively discharged although at the time she resigned she was no longer supervised by Ford. (R1-Morgan Dep.-153; Exhibit 3 at ¶4). And petitioner admits that during the some 5½ months before her resignation when she was not supervised by Ford she had little contact with him: "And I told you several times that I very seldom saw him after he did not supervise me." (R1-Morgan Dep.-172).

Restating these facts with all inferences in her favor, the Eleventh Circuit held that there were genuine issues of material fact under Title VII as to whether petitioner had been constructively discharged as a result of sexual harassment. 6 F.3d at 755-56. The court affirmed summary judgment against her First Amendment speech claim and

rejected without separate discussion her Title VII retaliation claim under 42 U.S.C. § 2000e-3(a). The lower court rejected her First Amendment claim on the ground that her private complaint of alleged sexual harassment against her was not of public concern.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION

This case does not warrant Supreme Court intervention. Unlike petitioner's representations, the Eleventh Circuit decision does not conflict with precedents of this Court, there is no genuine conflict in the circuits on issues presented, and there are no other "special and important reasons" calling for exercise of the Court's power of supervision. S. Ct. R. 10.1(a).

Petitioner seeks the extraordinary status of First Amendment protection against her employer, which is not available to private sector employees, for private complaints she made of alleged job discrimination against her. As Morgan admits in her deposition, in the speech for which she seeks protection, "[s]he [was] complaining about the effect that [the alleged sexual harassment] had on [her] ability to do [her] job." (R1-Morgan Dep.-174). And in her complaint, she alleges that her speech for which she now seeks protection concerns Ford's "sexual comments *to her* in the past." (R1-2-¶¶16, 31, 32) (emphasis added). Moreover, in her complaint to OFEP, Morgan complains only of sexual harassment against herself. (R1-48-Exhibit C at ¶9, Attachment 1 to Exhibit C). Although Morgan also spoke about a "co-worker's plight," 6 F.3d at 755, Morgan has not sought First Amendment protection for any speech she made concerning alleged sexual harassment against that

employee or any other employees of DOC, ACMI, or women in general.

Oddly, Morgan does not pursue her Title VII claim for retaliation. Under 42 U.S.C. § 2000e-3(a), it is "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Although Morgan pled a claim under this section in her complaint (R1-16-¶34), the Eleventh Circuit without discussion affirmed summary judgment against it, leaving for trial only the issue of whether Morgan suffered constructive discharge as a result of sexual harassment in violation of 42 U.S.C. § 2000e-2(a)(1).

It is apparent that Morgan has chosen to abandon her Title VII retaliation claim and pursue only her First Amendment speech claim in this Court because she seeks to expand legal protection for speech regarding job discrimination, particularly sexual harassment. Inasmuch as plaintiff's Title VII claim arose prior to the effective date of the Civil Rights of 1991, Morgan has no right to jury trial and her remedies are limited to "reinstatement with back pay and fringe benefits." 6 F.3d at 756. *See Landgraf v. USI Film Products*, ___ U.S. ___, No. 92-757 (April 26, 1994).[1]

Moreover, acceptance of Morgan's arguments would transform almost every Title VII claim by a public employee into a First Amendment claim, thus bypassing

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[1] Of course, even under the Civil Rights Act of 1991, the remedies for a Title VII plaintiff are inferior to the unlimited remedies available under Morgan's preferred vehicle, 42 U.S.C. § 1983. *See* 42 U.S.C. §§ 2000e-5, 1981a.

the Congressionally-limited remedies for retaliation against Title VII related speech. Respondent's admire the audacity of petitioner's effort but not its logic. Every public employee's job problems can easily be cast as retaliation for speech. Every governmental clerk can claim that the real reason she was disciplined or not promoted is something she said several weeks earlier about her unfair treatment. Petitioner's proposed expansion of public employee speech protection would paralyze discipline and productivity in public employment.

II. THE ELEVENTH CIRCUIT CORRECTLY INTERPRETED AND APPLIED THE RELEVANT PRECEDENTS OF THIS COURT.

The Eleventh Circuit's decision is fully consistent with this Court's public employee speech cases. Unlike petitioner's arguments, the Eleventh Circuit did not place "exaggerated – and extraordinarily unfair – emphasis on petitioner's failure to 'go public' with her sexual harassment charges." (Petition at 8). Moreover, the lower court did not, as petitioner argues, improperly consider petitioner's motive in deciding whether her speech was protected by the First Amendment.

In several important decisions, this Court has prescribed the parameters of a public employee's First Amendment right of free speech. The seminal case is *Pickering v. Board of Education*, 391 U.S. 563 (1968). A public high school teacher, Marvin Pickering, was fired for sending a letter to a local newspaper criticizing local education officials, under whom he worked, for practices in the use of school funds and the raising of such funds. The teacher thus "sp[oke] out publicly." *Id.* at 568. And he " 'sign[ed his] letter as a citizen, taxpayer and voter, not as a teacher.' " *Id.* at 578. The Court held:

> However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.
>
> [A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

391 U.S. at 574. In what has been called "the *Pickering* balance," the Court described various factors that should be considered or balanced in deciding whether a public employee's speech may furnish grounds for dismissal. The interests of the government "in promoting the efficiency of the public services" must be balanced against the employee's interest "as a citizen, in commenting upon matters of public concern." *Id.* at 568.

In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), the Court held that speech regarding racism, which was expressed privately by school teacher Bessie Givhan in encounters with her principal, was not without constitutional protection.

> The First Amendment forbids abridgment of the "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.

Id. at 415. Givhan's school district was under a desegregation order and her speech at issue was "the School District's allegedly racially discriminatory policies." *Connick v. Myers*, 461 U.S. 138, 146 (1983) (citing *Givhan*, 439 U.S.

410). Moreover, she "sp[oke] as a citizen on a *matter of general concern, not tied to a personal employment dispute.*" *Connick*, 461 U.S. at 148 n.8 (emphasis added) (citing *Givhan*, 439 U.S. at 415-16).

Another important case on this subject is *Connick v. Myers*, 461 U.S. 138 (1983). As assistant district attorney in New Orleans, Sheila Myers, who was unhappy with her job assignment, was fired for circulating a questionnaire which her employer considered insubordinate. Affirming the right established in *Pickering* of a public employee "to comment on matters of public interest," *id.* at 140, the Court held that the questionnaire was "most accurately characterized as an employee grievance concerning internal office policy," and the First Amendment claim under 42 U.S.C. § 1983 an "attempt to constitutionalize the employee grievance." *Id.* at 154. The Court pointed out that Myers "*did not seek to inform the public* that the District Attorney's Office was not discharging its governmental responsibilities. . . . *[n]or seek to bring to light* actual or potential wrongdoing or breach of public trust. . . . " *Id.* at 148 (emphasis added). The Court held that whether a public employee has spoken on a matter of public concern is determined by whether her "expression can[] be fairly considered as relating to any matter of political, social, or other concern to the community" and that this determination is made from "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 146-48. And, held the Court, "The inquiry into the protect status of speech is one of law, not fact." *Id.* at 148 n.7.

One of the questions, however, on the questionnaire in *Connick* inquired whether the other assistant district attorneys " 'ever feel pressured to work in political campaigns on behalf of office supported candidates.' " *Id.* at

149, 154-55. The Court found that this one question (out of a total of 14) "touched upon matters of public concern in only a most limited sense." 461 U.S. at 154. The Court thus applied the *Pickering* balance in order to determine whether Myers' discharge was constitutional in view of this question. While "caution[ing] that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern," *id.* at 152, the Court held that Connick was justified in regarding the questionnaire as a threat to his authority. *Id.* at 152-53.

The Court emphasized in *Connick* that constitutional speech protection is not available to private employees, *id.* at 147 (protection of public employee speech "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State"), and that abuse of such protection could severely hamper efficiency in public agencies:

> The repeated emphasis in *Pickering* on the right of a public employee "as a citizen, in commenting upon matters of public concern," was not accidental. This language, reiterated in all of *Pickering's* progeny, reflects both the historical evolvement of the rights of public employees, and the common-sense realization that *government offices could not function if every employment decision became a constitutional matter.*
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> * * *
>
> *To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark – and certainly every criticism directed at a public official – would plant the seed of a constitutional case.* While as a matter of good judgment, public officials

> should be receptive to constructive criticism offered by their employees, *the First Amendment does not require a public office to be run as a round-table for employee complaints over internal office affairs.*

Id. at 143, 149 (emphasis added).

Four years later, the Court again grappled with the speech rights of public employees. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court held that the First Amendment speech rights of a clerical employee, Ardith McPherson, in a Texas constable's office were violated when she was discharged for expressing support for the assassination of President Reagan. The Court first concluded that the statement "plainly dealt with a matter of public concern" because it was "made in the course of a conversation addressing the policies of the President's administration" and "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President." *Id.* at 386-87. Having found that the statement addressed a matter of public concern, the Court then placed it in the *Pickering* balance. *Id.* at 388-89.

Despite petitioner's urging that the public concern test for public employee speech be collapsed into an "objective" content-only standard (Petition at 16), this Court has held not only that the "content, form, and context . . . as revealed by the whole record" must be considered, *Connick*, 461 U.S. at 147-48, but also repeatedly affirmed that it is not "appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged." Rather, the Court has prescribed only "general lines along which an analysis of the controlling interests should run." *Pickering*, 391 U.S. at 569. *See also Connick*, 461 U.S. at 154. This framework

obviously requires the "case-by-case" assessment employed by the Eleventh Circuit. 6 F.3d at 755 n.7.

The Eleventh Circuit correctly interpreted and applied these and other relevant Supreme Court precedents. As part of the " 'content, form and context . . . as revealed by the whole record,' " *Connick*, 461 U.S. at 147, the lower court considered in its public concern analysis petitioner's motivation or intent in complaining of alleged sexual harassment and whether she attempted to communicate her concerns to the public. However, the lower court did not give controlling weight to either aspect. 6 F.3d at 754-55. *See also Kurtz v. Vickery*, 855 F.2d 723, 727 (11th Cir. 1988) ("Although an employee's efforts to communicate his or her concerns to the public are relevant to a determination of whether or not the employee's speech relates to a matter of public concern, focusing solely on such behavior, or on the employee's motivation, does not fully reflect the Supreme Court's directive that the content, form, and context must all be considered.")

The Eleventh Circuit did not depart from this Court's prescribed analysis by considering petitioner's "attempts to make [her] concerns public." 6 F.3d at 754. In *Pickering*, the letter to a newspaper was obviously a communication to the public. 391 U.S. at 565-66. In *Connick*, the Court considered Myers's failure to "seek to inform the public. . . . [or] to bring to light" any abdication of responsibilities or wrongdoing by her public employer. *Id.* at 148. The Court considered this in deciding that "with but one exception, the questions posed by Myers to her coworkers do not fall under the rubric of matters of 'public concern.' " *Id.*

The Eleventh Circuit also properly considered in its public concern analysis petitioner's motivation or intent in speaking. 6 F.3d at 754-55. In *Pickering*, the Court

considered that Pickering intended to speak "as a member of the general public" or "citizen." 391 U.S. at 568, 574. In *Connick*, as discussed above, this Court repeatedly refers to Myers' motivation in deciding whether her speech was on a matter of public concern. Indeed, the observation that Myers did not "seek" to make her concerns public is an evaluation of her intent. Moreover, the observation that her "focus . . . [was] not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors" is an assessment of her intent. 461 U.S. at 148. As the Court found, "These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbres." *Id.* And the Court's characterization of Myers' questionnaire as "an employee grievance concerning internal office policy" is also an assessment of her motivation. *Id.* at 154.

III. THERE IS NO GENUINE CIRCUIT CONFLICT OVER THE ISSUES IN QUESTION.

Petitioner argues that the "circuit courts are now in fundamental conflict on *Connick* and the probability of a shift toward greater doctrinal uniformity is remote." She elaborates that the "courts have reached conflicting decisions on whether speech is constitutionally protected based upon the weight given to the plaintiff's 'motive' in speaking." (Petition at 19). She argues that the Eleventh Circuit's holding concerning " 'motive' in speaking is at odds with the analytical approach generally taken by the Courts of Appeals for the First, Third, Fifth, Ninth, Tenth, and District of Columbia Circuits." She states, "The Fifth and Tenth Circuits provide perhaps the leading examples." (Petition at 20 n.12; 20).

Petitioner offers as her best example of a circuit conflict *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1644 (1993). Plaintiff Marilyn Wilson contended that her demotion and discharge from the position of sergeant on the University of Texas Health Center ("UTHC") police force was in "retaliation for her reports of sexual harassment within the UTHC police force." *Id.* at 1265. She presented a number of claims including violation of her First Amendment speech rights. *Id.* Wilson made written reports of an incident of alleged sexual harassment directed against her and of alleged sexual harassment directed against several other UTHC employees. She was later reprimanded, suspended, demoted, and eventually terminated purportedly for several problems including alleged misrepresentations in her reports of sexual harassment. *Id.* at 1266-67. The Fifth Circuit concluded that the district court erred in determining that Wilson's speech was not of public concern. The court noted, in language similar to the Eleventh Circuit's in the instant case: "The content of Wilson's speech – reports of sexual harassment perpetrated on her and other women at UTHC – is of great public concern." *Id.* at 1268. *Cf. Morgan*, 6 F.3d at 754, 755 n.7. The court distinguished its earlier decision in *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), on the ground that the speech held not of public concern in *Terrell* "was not of public concern in part because the speech consisted exclusively of criticisms of the competence of the speaker's supervisor." *Wilson*, 974 F.2d at 1269.[2]

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[2] In *Wilson*, the Fifth Circuit also distinguished *Connick* on the ground that the speech held not to be of public concern in *Connick* merely involved a public workplace and did not

The present case differs from *Wilson* in that, as discussed previously, instant petitioner's reports of alleged sexual harassment for which she contends she suffered retaliation concerned only sexual harassment against herself and not any other ACMI or DOC employees. In her complaint, Morgan alleges that while being interviewed regarding alleged sexual harassment against another ACMI employee, "plaintiff indicated that defendant Ford had made sexual comments to her in the past." (R1-2-¶ 16). She alleges that due to his comments she "contact[ed] Internal Affairs [of DOC] in order to file a formal complaint against defendant Ford." (*Id.*) Petitioner alleges that she later filed a charge with OFEP "alleging that she had been discriminated against because of her sex, and retaliated against for having filed sexual harassment charges against defendant Ford." (*Id.* at ¶ 24). In this charge with OFEP, Morgan complains only of sexual harassment against herself and that she was "retaliated against for having filed sexual harassment charges against [her] supervisor." (R1-48-Exhibit C at ¶ 9, Attachment 1 to Exhibit C). In her complaint in the district court, petitioner alleged that her complaints of sexual harassment directed against her, including the filing of

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concern " 'public official misconduct.' " 973 F.2d at 1269 (cit. omitted). This is frankly mistaken because one of the questions held not of public concern in *Connick* asked whether members of the District Attorney's office had "confidence in and would . . . rely on the word of" certain named supervisors. *Connick*, 461 U.S. at 148, 155. Obviously, this question does relate to official misconduct. But it was held by this Court not to be of public concern because in view of its "content, form, and context" it was a "mere extension[] of Myers' dispute over her transfer." *Id.* at 148.

charges of discrimination, "were [First Amendment] protected activities addressing matters of public concern" and as a result of this speech she suffered various forms of retaliation. (R1-2-¶¶ 21, 24, 25, 31, 32). In fact, Morgan does not even allege with her complaint that she made any statements regarding sexual harassment directed against other ACMI or DOC employees. She merely alleges that in the context of an interview concerning a "co-worker's sexual harassment complaint against defendant Ford" she stated "that defendant Ford had made sexual comments to her [petitioner] in the past." (R1-2-¶¶ 14-16). Further, petitioner admits in her deposition that "she [was] complaining about the effect that [the alleged sexual harassment] had on [her] ability to do [her] job." (R1-Morgan Dep.-174).

Thus, the Eleventh Circuit's conclusion is eminently correct that "the main thrust of her speech took the form of a private employee grievance." 6 F.3d at 755. Indeed, the only speech for which Morgan asserts First Amendment protection in her complaint is her private grievance that allegedly interfered with her "ability to do [her] job." (R1-Morgan Dep.-174). *Wilson* is, therefore, a quite different case in that Wilson claimed First Amendment protection for speech concerning widespread sexual harassment and there was no evidence that her only purpose was improvement of her own job conditions.

Petitioner is mistaken in thinking the Fifth Circuit does not consider efforts to communicate with the public and motivation or intent in deciding the public concern issue. In *Terrell* the Fifth Circuit held that the contents of a notebook were not protected speech because in part appellant "made no effort to communicate the contents of the notebook to the public." 792 F.2d at 1362-63. Also in *Ayoub v. Texas A&M University*, 927 F.2d 834 (5th Cir.),

cert. denied, 112 S.Ct. 72 (1991), the Fifth Circuit affirmed a judgment notwithstanding the verdict to the effect that appellant's speech regarding pay disparity directed against foreign-born professors was not protected by the First Amendment because it did not involve a matter of public concern. In support of this holding, the court found that appellant complained only about his own salary and that he "never attempted to air his complaints in a manner that would call the public's attention to the alleged wrong." *Id.* at 837. Further, in *Knowlton v. Greenwood Independent School District*, 957 F.2d 1172 (5th Cir. 1992), the Fifth Circuit held that cafeteria workers' complaints about being required to serve meals after hours and without pay were not protected by the First Amendment. *Id.* at 1178 ("The record reflects that the workers' concern was the effect of the meal program on their employment and personal lives, rather than the public interest in [Fair Labor Standards Act] violations."). *See also Brawner v. City of Richardson, Texas*, 855 F.2d 187 (5th Cir. 1988) (in holding that letter by police officer was on matter of public concern, court emphasized that: letter "contain[ed] serious allegations of possible police misconduct"; was sent "not simply as an employee, but as a citizen"; and was "sent not only to the police chief, but also to the mayor, city council members, and reporters at the local paper").

Petitioner also showcases *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), as in conflict with the Eleventh Circuit's decision here. The Tenth Circuit reviewed police officer Sheldon Wulf's letter to the Kansas Attorney General containing allegations of widespread misconduct by the chief of police of Wichita and " '[g]ross misconduct on the part of a staff member in the sexual harassment of a

subordinate employee.' " *Id.* at 850. Wulf was the president and a member of the executive board of the state Fraternal Order of Police ("FOP"). The main thrust of his letter was to expose the chief of police's widespread discrimination against the FOP and its members and to "request[] an investigation." *Id.* at 848-50. In addition to forwarding the letter to the attorney general, Wulf "showed an earlier draft of the letter to several officers who were active in the state FOP." *Id.* at 849. He also showed the letter to an assistant district attorney and its contents were disclosed to news reporters. *Id.* at 849-51. The court did not specifically decide whether the disputed incident of alleged sexual harassment was of public concern because the "remaining allegations" did involve such concern. *Id.* at 860. In finding the letter protected speech, the court emphasized that it was communicated outside the police department to the attorney general and that its intent was to "seek[ ] an investigation of alleged misconduct by a public official." *Id.* at 860.

It is thus apparent that the Eleventh Circuit's decision in *Morgan* is not in conflict with *Wulf*. In both cases, the respective courts considered in their public concern analyses efforts to communicate with the public and the employees' motivation in speaking.

And the Tenth Circuit frequently considers efforts to communicate with the public and motivation in deciding whether public employee speech is on a matter of public concern. In *Koch v. City of Hutchinson*, 847 F.2d 1436 (10th Cir.) (*en banc*), *cert. denied*, 488 U.S. 909 (1988), the court held that a report by a city fire marshal "in which he stated his professional opinion as to the cause of a fire" did not address a matter of public concern for First Amendment purposes. *Id.* at 1437, 1447. The court held that his "report did not 'sufficiently inform the issue as to

be helpful to the public in evaluating the conduct of government.' " *Id.* at 1447 (cit. omitted). And the court found regarding motivation:

> But there is no evidence that Koch's fire investigation report and his conclusion as to the cause of the fire was in any way motivated or inspired by such alleged improprieties or by the desire to expose those improprieties.

Id. at 1448. *See also Conaway v. Smith*, 853 F.2d 789, 796-97 (10th Cir. 1988) (considering city employee's "motivat[ion]" and that he "sought 'to bring to light actual or potential wrongdoing or breach of public trust on the part of a public officer,' " in holding speech to be protected) (cit. omitted).

Petitioner is also mistaken in asserting that there is a conflict between the Eleventh Circuit's decision here and "the analytical approach generally taken" by other circuits in addition to the Fifth and Tenth, namely: the First, Third, Ninth, and District of Columbia Circuits. (Petition at 20 n.12).[3] Petitioner erroneously describes the views of these circuits, just as she does those of the Fifth and Tenth. In fact, all of the circuits – just as the Fifth, Tenth, and Eleventh – consider effort to communicate with the public and employee motivation or intent in deciding the public concern issue.[4]

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[3] Petitioner concedes that decisions of the Second, Sixth, and Seventh Circuits are consistent with *Morgan*. (Petition at 23-26).

[4] *See* **First Circuit:** *O'Connor v. Steeves*, 994 F.2d 905, 913-14 (1st Cir.), *cert. denied, sub nom Town of Nehunt, Mass. v. O'Connor*, 114 S.Ct. 684 (1993) (where public employee speech is "on a topic which would not necessarily qualify, on the basis of content alone, as a matter of inherent public concern (e.g., *internal working conditions, affecting only the speaker and coworkers),*"

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consideration may be given to "whether the 'form' of the employee's expression suggests a *subjective intent to contribute to any . . . public discourse*") (emphasis added); *Brasslet v. Cota*, 761 F.2d 827, 841-42 (1st Cir. 1985) (considering "question of *malice* . . . a *subjective inquiry into the speaker's actual state of mind*" in holding that fire chief's speech in a television interview concerning "available fire protection within the Town and the Town Council's actions in dealing with related problems is a prototypical matter of public interest") (emphasis added); **Second Circuit:** *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 142 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1189 (1994) ("Here, however, there has been no violation of the First Amendment, because Saulpaugh's *complaints were 'personal in nature and generally related to her own situation.'* [cit. omitted]. In the instant case there is no indication that the plaintiff 'wanted to debate issues of sex discrimination,' that her suit sought 'relief against pervasive or systemic misconduct by a public agency or public officials,' or that her suit was 'part of an overall effort . . . to correct allegedly unlawful practices or bring them to public attention. [cit. omitted]. Although evidence was subsequently uncovered that Rosemond had also sexually harassed a prior employee, Saulpaugh's complaints, like those of the plaintiffs in *Ezekwo* and *Yatvin*, were *motivated by and dealt with her individual employment situation.*") (emphasis added); **Third Circuit:** *Versarge v. Township of Clinton New Jersey*, 984 F.2d 1359, 1364-65 (3d Cir. 1993) ("[T]he speaker's *motivation is relevant* to the extent that it indicates whether the speaker is speaking as 'a citizen upon matters of public concern' or . . . 'upon matters only of personal interest.'. . . . [T]he *content* of plaintiff's speech *is not determinative* of whether the speech involves public concern.") (emphasis added); *Rode v. Dellarciprete*, 845 F.2d 1195, 1200-02 (3d Cir. 1988) (*"[M]otivation [is] merely one factor* to be considered, but *not necessarily controlling*, in assessing the character of the employee's speech. . . . [W]e hold that when a public employee participates in an interview sought by a news reporter on a matter of public concern, the employee is engaged in the exercise of a first amendment right to freedom of speech, even

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though the employee may have a personal stake in the substance of the interview.") (emphasis added); **Fourth Circuit:** *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986) (considering a public school teacher's aide's "communicat[ion] to a public official" and whether her motive was to expose "wrongdoing or a breach of trust . . . [instead of expressing a] *personal grievance about working conditions,*" in holding speech not of public concern) (emphasis added); *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990) ("And it is settled that a public employee's expression of grievances concerning his own employment is not a matter of public concern."); **Sixth Circuit:** *Thomson v. Scheid*, 977 F.2d 1017, 1020-21 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 2341 (1993) (considering county investigator's intent and fact that he spoke only in course of duties, in holding speech regarding fraud investigation not of public concern); **Seventh Circuit:** *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 587-88 (7th Cir. 1992) (considering *"plaintiff's goal"* and *"choice of [non-public] forum"* in holding speech by former university faculty not of public concern) (emphasis added); *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412, 419 (7th Cir. 1988) (holding that sex discrimination complaint against a school district was not on a matter of public concern because the plaintiff "wanted to advance her career, not promote a cause"); **Eighth Circuit:** *Bausworth v. Hazelwood School District*, 986 F.2d 1197, 1198-99 (8th Cir. 1993) ("we consider *whether the employee attempted to communicate the speech to the public at large* and the employee's *motivation* in speaking") (emphasis added); **Ninth Circuit:** *McKinley v. City of Eloy*, 705 F.2d 1110, 1114-15 (9th Cir. 1983) (considering that police officer's "speech was specifically and *purposefully directed to the public* both through city council meetings and a television interview," in holding it to be of public concern); **District of Columbia Circuit:** *Hall v. Ford*, 856 F.2d 255, 259-60 (D.C. Cir. 1988) ("Speech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental

IV. RESPONDENTS ARE IN ANY EVENT ENTITLED TO QUALIFIED IMMUNITY AGAINST PETITIONER'S FIRST AMENDMENT CLAIM.

Even if the individual respondents somehow violated petitioner's First Amendment rights, she cannot overcome their qualified immunity.[5]

Under the objective test of qualified immunity currently in effect, a public employee is protected unless his conduct "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The defense is established if "a reasonable [public official] could have believed [his actions] to be lawful, in light of clearly established law and the information [he] possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The qualified immunity issue presented here, which was not reached by the Eleventh Circuit, may be stated as follows: whether at the time of respondents' actions reasonable prison officials in their positions could have believed that private complaints by a public employee of alleged job discrimination against him or her that were

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agencies. On the other hand, speech that concerns 'issues about which information is needed or appropriate to enable members of society' to make informed decisions about the operation of their government merits the highest degree of first amendment protection.") (cit. omitted).

[5] This Court has held that, before reaching qualified immunity, the trial court should first "determin[e] . . . whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 111 S.Ct. 1789, 1793 (1991). However, instant respondents' near certain entitlement to qualified immunity would hardly make this case an appropriate vehicle for the massive doctrinal change petitioner seeks.

made for the purpose of improving that employee's working conditions were not on a matter of public concern to the community and thus not protected by the First Amendment. Without question, in light of previously-discussed Supreme Court precedents, Eleventh Circuit authority, and the unanimous view of the other circuits, reasonable prison officials could hardly have believed otherwise. Indeed, any expectation that a private complaint of alleged job discrimination made for the purpose of improving the complainant's working conditions would be considered on a matter of public concern and therefore eligible for First Amendment protection would have required the skill of a prophet. Much is expected of public employers, but prophecy has never been required.

CONCLUSION

The Court should therefore deny the petition. In considering Morgan's lack of effort to communicate with the public and intent or motivation in making a private complaint of alleged job discrimination, the Eleventh Circuit fully obeyed this Court's precedents and acted consistently with the decisions of the other circuits. And there are no other "special and important reasons" calling for review inasmuch as the wholesale revision of public employee speech protection sought by petitioner would have drastically detrimental effects on efficiency and discipline in public employment.

Petitioner is not left without a remedy. She has been remanded to the district court for trial of her Title VII sexual harassment claim. She could have pursued here, but chose not to, her Title VII speech retaliation claim. This gambit on her part in hopes of catalyzing massive doctrinal change should hardly be rewarded.

Moreover, her bizarre citation to Georgia criminal laws against violent conduct and her quotation of various non-record, irrelevant, and hearsay news articles regarding alleged sexual misconduct involving prison staff and inmates at other institutions in Georgia (Petition at 7-8, 29 n.18) hardly support her petition but rather show its poverty.

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